

IN THE UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF MISSOURI
 WESTERN DIVISION

ERICA BARRETT, ET AL,)	
)	
Plaintiffs,)	No. 22-3111-CV-S-BCW
)	May 23, 2023
v.)	Kansas City, Missouri
)	CIVIL
O'REILLY INC. ET AL,)	
)	
Defendants.)	

TRANSCRIPT OR ORAL ARGUMENT
 BEFORE THE HONORABLE BRIAN C. WIMES
 UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic voice writing
 Transcript produced by computer

APPEARANCES

For Plaintiffs: MR. MARK GYANDOH
 Capozzi Adler
 312 Old Lancaster Road
 Merion Station, PA 19066

For Defendants: MR. W. JOSEPH HATLEY
 Spencer Fane LLP - KCMO
 1000 Walnut Street
 Suite 1400
 Kansas City, MO 64106-2140

MR. MICHAEL S. HINES
 MS. MARY GRINMAN
 Skadden, Arps, Slate, Meagher & Flom
 500 Boylston Street
 Boston, MA 02116

MR. JEFFREY GROVES
 O'Reilly's in-house counsel

Denise Carroll Halasey CCR, CVR-CM, RVR
 United States Court Reporter

1 May 23, 2023

2 (Proceedings began at 2:37 PM)

3 THE COURT: Let the Court call the case. This is
4 Erica Barrett versus O'Reilly Automotive, Inc. Case No.
5 22-cv-03111. Can I have parties enter their appearance for
6 the record, and I'll start with the plaintiff.

7 MR. GYANDOH: Good afternoon, Your Honor. My name
8 is Mark Gyandoh from Capozzi Adler, and I represent the
9 plaintiff.

10 THE COURT: Thank you. Pronounce your last name
11 again.

12 MR. GYANDOH: John Doe, just like the unidentified
13 person.

14 THE COURT: John Doe?

15 MR. GYANDOH: Yes, sir.

16 THE COURT: Okay. Thank you.

17 I see you have done that a few times.

18 MR. GYANDOH: Yes, Your Honor.

19 THE COURT: Okay.

20 And for the defense.

21 MR. HATLEY: Good afternoon, Your Honor. Joe Hatley
22 from Spencer Fane. I'd like to introduce Michael Hines from
23 Skadden Arps who has been admitted pro hac, and Mr. Hines
24 will introduce the rest of the defense this afternoon.

25 THE COURT: Okay. Thank you.
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 MR. HINES: Good afternoon, Your Honor.

2 Michael Hines on behalf of defendants. With me from
3 my office is Mary Grinman, and we also brought the summer
4 associate with us to witness the proceedings, Charlie Talisse.
5 And also present in the courtroom is in-house counsel at
6 O'Reilly, Jeffrey Groves.

7 THE COURT: Okay. Pleasure.

8 So Mr. Hines, are you making the argument?

9 MR. HINES: Yes, Your Honor.

10 THE COURT: Okay.

11 Well, since it's defense motion, Mr. Hines.

12 MR. HINES: And good afternoon, Your Honor. It's
13 good to be back.

14 This case concerns allegations that O'Reilly and the
15 other defendants breached fiduciary duties under the Employee
16 Retirement Income Security Act in connection with the
17 management of the O'Reilly 401(k) Retirement Plan. In the
18 amended complaint it serves two counts.

19 Count 1, alleges that the committee charged with
20 administering the Plan breached its fiduciary duty of
21 prudence. Count 2 alleges that O'Reilly and O'Reilly's Board
22 of Directors breached their fiduciary duty to monitor that
23 committee.

24 THE COURT: Let me ask you this. So if Count 1
25 fails, would your argument be to the Court that Count 2 fails?
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 MR. HINES: That's exactly my argument.

2 THE COURT: Would plaintiffs say that? And I know
3 you will get up and talk to me about that. Would the parties
4 agree or are you not sure?

5 MR. HINES: I believe that Mr. Gyandoh would agree
6 with the concept if Count 1 is dismissed, then Count 2 is also
7 dismissed.

8 And I will let Mr. Gyandoh speak for himself.

9 THE COURT: Certainly, sir. I put you on the spot.

10 MR. HINES: Not at all. Not at all.

11 So and because of that, Your Honor, I plan to spend
12 most of my time talking about the prudent allegations in Count
13 1.

14 And the ERISA duty of prudence requires that
15 fiduciaries use the same skill, prudence, diligence, under the
16 circumstances as a prudent person would use.

17 In October of last year the Eighth Circuit in the
18 Matousek case reaffirmed the pleading standard to be applied
19 in cases alleging breach of the duty of prudence. We
20 submitted the Matousek case to Your Honor, Supplemental 30 at
21 Docket No. 44. And in that case the Eighth Circuit held that
22 where a plaintiff pleads a prudence claim it's the process is
23 what ultimately matters, and not the outcome. And therefore,
24 a plaintiff must plead enough facts for a Court to be able to
25 --

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 THE COURT: Process not the outcome, what does that
2 mean?

3 MR. HINES: It means that let's say for example, if
4 there were performance allegations, and an investment ended up
5 performing poorly, that's not what matters. What matters is
6 the process that led to the selection of that investment. And
7 so the Eighth Circuit says that in order to do that it is not
8 enough to merely allege that a retirement plan's costs and
9 fees are too high. That doesn't work. Instead, the Eighth
10 Circuit says the key is providing a sound basis for comparison
11 or a meaningful benchmark by which to evaluate a retirement
12 plan's costs or fees or performance. And that, Your Honor, is
13 what the plaintiffs here failed to do.

14 THE COURT: And let me ask you this, Mr. Hines,
15 typically, in these 12(b)(6) cases, at least the arguments
16 made to the Court and I'm like, well, Judge, we've pled
17 enough, let's get through discovery and at this stage maybe,
18 Judge, you shouldn't be ruling favorably on a motion to
19 dismiss at this early stage. Is it different some way than
20 kind of the typical case or same standard or has the law
21 suggested otherwise for this Court? Do you see where I'm
22 going?

23 MR. HINES: I do see where you are going, Your
24 Honor, and I guess I have a few responses to that.

25 THE COURT: Sure.
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 MR. HINES: Is the pleading standard different?
2 Well, in ERISA cases you do have to plead a meaningful
3 benchmark. And I'll get to that with Judge Clark and Judge
4 Pitlyk and those cases, and I'll talk about that.

5 THE COURT: Okay. Out of the Eastern District of
6 Missouri?

7 MR. HINES: Correct, both of those cases are in the
8 Eastern District.

9 THE COURT: Okay.

10 MR. HINES: But I would also say, Your Honor, the
11 argument, well, let's just proceed to discovery and let it
12 sort itself out and we can get to the summary judgment. Well,
13 I would say there, Your Honor, that the Supreme Court in the
14 Dudenhoeffer case which we cite in our cases or in our briefs,
15 says that what? The motion to dismiss is an important
16 mechanism to weed out these cases early. And the Second
17 Circuit, and we said this in our opening brief at Page 5 in
18 the Pension Benefit case, and they say -- addressing a similar
19 type of argument. They say, in deed the prospect of discovery
20 and the suit claiming breach of fiduciary duty is ominous
21 potentially exposing ERISA fiduciaries to probing and costly
22 inquiries and document requests. Dismissing ERISA claims that
23 rest on conclusion or allegations prevents settlement
24 extortion where a plaintiff with a largely groundless claim
25 will simply take up the time of a number of other people with
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 the right to do so representing an in terrorem increment of
2 the settlement value. So Your Honor, I would say that -- I
3 would respectfully object to the proposition that we should
4 just allow this to go to discovery and sort it out later, for
5 varying reasons, but for the Supreme Court and the Second
6 Circuit.

7 THE COURT: Sure.

8 MR. HINES: Getting back to the meaningful
9 benchmark. We respectfully submit, Your Honor, that's what is
10 missing here. And here the plaintiffs' duty of prudence claim
11 is based on three categories of allegations. The first set of
12 allegations is that some of the Plans' investment options cost
13 too much. That's at Paragraphs 66 through 70. The second set
14 of allegations that the plaintiff say the Plans' fees for
15 record-keeping services are too high. And then lastly,
16 plaintiffs allege that the Plans' total costs, that is
17 essentially investment fees plus the record-keeping fees, are
18 too high. And we respectfully submit that the amended
19 complaint should be dismissed under the pleading standard
20 articulated in Matousek, and as recently applied in cases with
21 identical allegations, not similar, identical allegations by
22 Judge Clark in the Riley case, and Judge Pitlyk on the
23 Williams. And we cited Judge Clark's Riley decisions
24 throughout our papers. And we submitted Judge Pitlyk's
25 decision in Williams as Supplemental 40, Docket No. 62.

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 THE COURT: Is that simply persuasive for the Court?

2 MR. HINES: Correct, Your Honor. It is certainly
3 not binding. I'd say Matousek, the Eighth Circuit certainly
4 is. But Judge Clark and Judge Pitlyk applying Matousek, I
5 think, I submit is persuasive, correct.

6 THE COURT: Okay.

7 MR. HINES: And unless Your Honor would like to
8 proceed differently, I thought I would address plaintiffs'
9 three categories of allegations beginning with the investment
10 cost claims.

11 THE COURT: Sure.

12 MR. HINES: In support of the allegation that the
13 funds or certain that the funds cost too much, plaintiffs rely
14 exclusively on industry averages and medians provided by the
15 Investment Company Institute or ICI. And that is in
16 Paragraphs 67 to 68. But in the Eighth Circuit ICI medians
17 and averages are not sufficient to state in a prudence claim.
18 And Judge Clark in the Riley case rejected the identical ICI
19 data as insufficient to satisfy the Eighth Circuit's
20 meaningful benchmark standard. In there he held, quote, "The
21 Eighth Circuit requires the Court to thoroughly compare
22 challenged funds and punitive benchmark funds with regard to
23 fund holdings, investment style, and investment strategy."
24 And in that case, Judge Clark held that because neither the
25 complaint in that case nor the ICI data itself provided that
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 required information that they did not constitute -- or the
2 ICI data did not constitute a meaningful benchmark by which to
3 compare the fees for the investment options in that claim.

4 Judge Pitlyk held the same thing in the Williams
5 case on the same grounds, and she fuller stated citing to
6 Matousek, that it simply isn't enough to allege that costs are
7 too high. That is all that the plaintiffs here have done,
8 Your Honor, exactly what the plaintiffs in Riley and Williams
9 did. And the ICI averages that are in the complaint tell the
10 Court nothing about the funds that comprise those averages.
11 And because of that they cannot constitute meaningful
12 benchmarks in this Circuit.

13 And moving to plaintiffs' record-keeping claims.
14 Plaintiffs allege at Paragraph 90 that the Plans'
15 record-keeping fees also cost too much. And according to the
16 complaint the Court should infer that those fees are excessive
17 based on three things. The plaintiffs prefer the comparison
18 of the alleged fees of the O'Reilly Plan with the
19 record-keeping fees of certain other retirement plans.
20 Secondly, the complaint, the amended complaint cites to a
21 stipulation entered into by different record-keeper, Fidelity,
22 in a different litigation. And then third, plaintiffs' allege
23 that the O'Reilly fiduciaries failed to conduct what
24 plaintiffs say is a required, a mandatory request for proposal
25 for record-keeping fees. And Judge Clark and Judge Pitlyk,
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 they address each of those allegations individually or
2 collectively, they do not stand a claim. And taking each one
3 in term, first, the fees of the comparative plans. At
4 Paragraphs 96 and 97 of the amended complaint, plaintiffs'
5 allege that because 19 other retirement plans paid less fees
6 on a per participant basis than did the O'Reilly Plan, the
7 O'Reilly's Plans' record-keeping fees must be too high. But
8 the comparative plans are not meaningful benchmarks in this
9 circuit because in this complaint are allegations comparing
10 the services provided by the record-keeper to the O'Reilly
11 Plan, with the services provided by the record-keepers to the
12 comparatory plans. In the Eighth Circuit in Matousek held
13 that a plaintiff must identify similar plans offering the same
14 services for less. And applying that standard in the Riley
15 case, Judge Clark rejected a similar table purporting to list
16 the record-keeping fees of other plaintiffs. And in that
17 regard, Judge Clark held that to plead such a claim in this
18 circuit, the plaintiff must plead that the administrative fees
19 are excessive in relation to the specific services received.
20 And because there the plaintiffs did not plead any facts about
21 the specific services of those plans, those comparison plans
22 were not meaningful benchmarks. Judge Pitlyk held the exact
23 same thing. And in fact, I would say in Judge Pitlyk's case,
24 Judge Pitlyk rejected the identical table that the plaintiffs'
25 put forth here at Paragraph 96, right down to the same

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 comparatory plans. And she said because the amended complaint
2 is silent as to which record-keeping service those plans
3 received, they do not constitute meaningful benchmarks. And I
4 would submit here, so here too, Your Honor, the amended
5 complaint does not plead any services received by the
6 comparative plans making an apples to apples comparison
7 impossible.

8 Plaintiffs also allege that the fidelity, a fidelity
9 stipulation leads to an inference that the O'Reilly's
10 plaintiffs' fees were excessive. In the Fidelity stipulation,
11 Fidelity stipulated in a completely different litigation that
12 the services it provided to its own in-house 401(k) Plans had
13 a market value of \$14 dollars to \$21 dollars per participant.
14 Judge Pitlyk considered that allegation in the Williams case,
15 and she held, quote, "Plaintiffs do not explain how the
16 services that Fidelity provided to its own Plans are
17 equivalent to the services provided to the plans at issue in
18 this case. And without such allegations the \$14 to \$21 dollar
19 figure cannot serve as an adequate market comparatory." I
20 would submit to Your Honor that plaintiffs' identical
21 allegation, the same one that Judge Pitlyk considered in
22 Williams should be rejected for the exact same reason.

23 And then lastly, when it comes to record-keeping
24 fees, plaintiffs' allege at Paragraphs 88 and 89 that
25 fiduciaries must conduct a request for proposal for
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 record-keeping fees, and there is little here to suggest that
2 the defendants did so.

3 Again, I hate to sound like a broken record --

4 THE COURT: Say that again.

5 MR. HINES: Sure.

6 THE COURT: Repeat what you just said.

7 MR. HINES: Sure.

8 She said, the allegation here at the amended
9 complaint, Paragraphs 88 and 89, plaintiffs' allege that
10 fiduciaries, quote, "must" unquote, conduct a request for
11 proposal for record-keeping fees. And they also allege that
12 there is little to suggest that the defendants' conducted a
13 requested proposal in this case. And Judge Pitlyk ruled on
14 that identical allegation word for word. And there she held
15 that even if true, that is, even if the defendants in that
16 case did not conduct an RFP for record-keeping services, that
17 is of no moment because they are not required to do so. And
18 in making that holding, Judge Pitlyk replied on Judge Clark's
19 decision on Riley, where he held, quote, allegations that the
20 plan fiduciaries were required to solicit competitive bids on
21 a regular basis has no legal foundation, unquote.

22 I submit to Your Honor that plaintiffs' identical
23 allegations at Paragraphs 88 and 89 also fail to state a claim
24 for those same reasons.

25 Moving on for a total Plan costs which is the third
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 category of allegations that plaintiffs' claim need reach
2 fiduciary duty of prudence. Plaintiffs' allege that
3 Paragraphs 72 to 75 that ICI developed a total Plan cost
4 measures that includes all fees of the retirement plan and
5 O'Reilly's retirement Plans total plan cost was higher than
6 the average total plan cost of similarly sized plans. But
7 similar to plaintiffs' investment fee allegations based on ICI
8 averages, Judge Pitlyk held that a general industry average
9 cannot serve as a meaningful benchmark. Because to be
10 meaningful in this Circuit, a plaintiff must plead that the
11 challenged fees are excessive in relation to specific services
12 received. And the same is true here, and in fact, plaintiffs'
13 total Plan costs allocations in this case are word for word
14 identical to those in the Williams compliant.

15 So summing up Count 1, Your Honor, because
16 plaintiffs merely allege that certain other plans costs are
17 too high without providing a meaningful benchmark in which the
18 Court can compare those costs, Count 1 fails to state a claim.

19 THE COURT: Would it be fair kind of generally and
20 maybe this is over simplifying the issue. There has to be a
21 level of -- with these in terms of the record-keeping, the
22 total cost, total plan cost, and -- there has to be a level of
23 particularity as it relates to the comparison they make within
24 their pleading. Does that make sense?

25 MR. HINES: It does, Your Honor.
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 THE COURT: It seems to me in just looking at this
2 and looking at the case law, there has to be -- we can't make
3 these broad, kind of comparisons, without some level of
4 meaningful -- and I know maybe the term we'll use and maybe I
5 should do that, is meaningful benchmarks. But it has to be
6 some sound comparison.

7 MR. HINES: Correct, Your Honor. And I don't think
8 that is oversimplifying at all. And in fact, I think that's
9 what the Eighth Circuit requires.

10 THE COURT: Okay.

11 MR. HINES: And that's exactly what Judge Clark and
12 Judge Pitlyk said.

13 THE COURT: Okay.

14 MR. HINES: I talked about the Count 2, Your Honor,
15 if Count 1 fails, Count 2 fails too, as well.

16 One other small point, Your Honor, if I may? In the
17 concluding paragraph of the opposition brief plaintiffs'
18 request to file a further amended pleading, if, and only if
19 Your Honor grants our motion.

20 THE COURT: That's what I was going to ask too.

21 MR. HINES: We submit that a further amendment is
22 not appropriate particularly because plaintiff previously
23 amended once in response to our first motion to dismiss.
24 Judge Pitlyk denied an identical informal request to amend in
25 the concluding paragraph of the opposition brief in that case
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 as well for the same reason. We respectfully submit that the
2 amended complaint should be dismissed with prejudice.

3 THE COURT: Okay. Thank you.

4 MR. HINES: Thank you, Your Honor.

5 THE COURT: Mr. Gyandoh.

6 MR. GYANDOH: Thank you, Your Honor.

7 I think I'll start with where we are with the case
8 law.

9 THE COURT: And let me ask you this with regard to
10 Count 1 and Count 2?

11 MR. GYANDOH: I concede that if Count 1 fails, Count
12 2 fails.

13 THE COURT: Okay. That's what I wanted to know.

14 MR. GYANDOH: Pretty simple.

15 THE COURT: Yes.

16 Let's talk about case law.

17 MR. GYANDOH: Okay.

18 Let me start with the Eighth Circuit in Matousek.
19 That actually was one of the cases -- it was my case which I
20 argued before the Eighth Circuit. And the issue there was a
21 little different than the issue here. The issue of Matousek
22 that the Eighth Circuit focused in on was the fact that in
23 that complaint plaintiffs had alleged that it was -- the
24 record-keeper had charged like something like \$300 per
25 participant for record-keeping. If the defendants had
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 introduced evidence to show that that amount also included
2 other services other than record-keeping, so what the Eighth
3 Circuit said was we hadn't really distinguished -- it wasn't
4 an amenable comparing, because we are comparing the \$300 to
5 other record-keeping fees whereas she should have done it to
6 fees that included record-keeping and other services.

7 THE COURT: Would defense disagree with that? I
8 don't want to limit it.

9 MR. HINES: Let me answer it this way, I think that
10 is one of the issues.

11 THE COURT: Okay. All right.

12 MR. GYANDOH: And --

13 THE COURT: Let me ask you this question, and maybe
14 I'll answer my own question. Okay, say that was the issue.

15 MR. GYANDOH: Yeah.

16 THE COURT: Say the Eighth Circuit did say, well,
17 you know, because the record-keeping fees included others and
18 this didn't, right? So that is not a meaningful comparison.
19 It still requires, right? It still requires not some blanket
20 or generalized pleading, it requires a level of comparison
21 beyond just, hey, I picked this and record-keeping and these
22 numbers are significantly higher than this. To me it seems
23 like, okay, I would agree with you. The Eighth Circuit is
24 saying this, and they're telling me a meaningful benchmark
25 lies on a sound basis of comparison. And in that case there

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 wasn't a sound basis of comparison when you look further and
2 determined that these included other things. Would you
3 disagree?

4 MR. GYANDOH: No, I'm with you there with respect to
5 that case. But I think we have a sound basis here because
6 what we have attempted to do is compare record-keeping to
7 record-keeping. Record-keeping which in our comparatives.
8 And why I think it sound. First of all, the Eighth Circuit
9 has also said in the Washington versus Davis case there was no
10 one way to show making comparisons.

11 THE COURT: There has to be some level of
12 similarity.

13 MR. GYANDOH: That's right.

14 THE COURT: How big is this Plan and how big are the
15 ones that you're comparing them to record-keeping?

16 MR. GYANDOH: Yes, that's a great question. So this
17 Plan has 50,000 participants. What we allege and what I don't
18 think is disputable is that most industry experts agree that
19 the more plan participants we have, the more the
20 record-keeping fees should be. So if you have 10,000
21 participants versus 50,000 participants, the 10,000
22 participant plan should have the higher fee than the
23 50,000-dollar participant plan.

24 THE COURT: But that's a general, but are we really
25 comparing it? That's my question because that to me sounds

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 like what you mentioned is, well, Judge, the record-keeping
2 fees required here and their services attached, and in this
3 instance there wasn't services attached, therefore, we don't
4 have the level of meaningful, what I'll call meaningful, a
5 sound basis for comparison. To me that's not just a sound
6 basis. That's saying, well, more plans tend to have more and
7 this tends to have less, therefore, your costs should be lower
8 than my cost. Let me ask you, do you believe that's enough?
9 I'm asking you.

10 MR. GYANDOH: Is it enough as we have it here?

11 THE COURT: Yes.

12 MR. GYANDOH: Yes. Because it is -- as part of
13 delegations is that record-keeping is driven by the number of
14 participants. So we do have other plans that have the same
15 amount of participants.

16 THE COURT: You do?

17 MR. GYANDOH: Yeah, if you look at our -- the
18 complaint we start on Paragraph 96, and we have we show that
19 the O'Reilly Plan had 53,000 participants. And then we go
20 through all the way -- we cite several plans, including the
21 Kaiser Plan, which had 47,000 participants. The key point
22 here is plans are considered large if you have more than
23 15,000 participants. So they are within the range -- the
24 comparative plans are within the range of the O'Reilly Plan.

25 THE COURT: So you're saying if I have 15,000 or
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 50,000, well, they are the larger plans therefore, we should
2 consider them?

3 MR. GYANDOH: I think they are reasonable
4 comparators.

5 THE COURT: You think? Is that the type of
6 comparison we need in terms of a meaningful benchmark? I
7 guess that would be the question.

8 MR. GYANDOH: Yes. And is that the only comparative
9 we have because this is -- the other problem -- we have cited
10 cases that sort of adopted it, not in this Circuit, but with
11 Fidelity, it's your price are both national record-keepers.
12 So what we did is we cited the -- there's a stipulation that
13 Fidelity had entered in in another case. What I take from
14 that stipulation is that Fidelity said they had a plan that
15 had 57,000 participants, and from 2014 to 2017, the services,
16 the value of services in that plan was anywhere from \$14 to
17 \$21.

18 THE COURT: Now, it seems like my colleagues from
19 the Eastern District, Judge Clark and Judge Pitlyk may have
20 found differently. And first let me ask is how counsel
21 Mr. Hines he suggested it was almost identical, the language
22 with regard to the petition that you're suggesting to this
23 Court. And they found that the services were equivalent or at
24 least enough -- again, I go back. I keep repeating a sound
25 basis for a sound comparison.

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 MR. GYANDOH: I would submit, yes, those cases are
2 similar. But here is one thing that --

3 THE COURT: So what is the difference? How should I
4 look at it differently?

5 MR. GYANDOH: I would like for you to understand
6 this from my perspective.

7 THE COURT: Sure.

8 MR. GYANDOH: Because the defendants not just in
9 this case, in a number of cases, have argued and some courts
10 have agreed that we have to allege the differences of services
11 between these plan. I will submit to you that the service
12 agreements of the comparative plans are not publically
13 available. When plaintiffs file a case we do not have an
14 access to service agreements for these other plans. So if
15 this Court -- where the Eighth Circuit says plaintiffs we
16 can't discuss a case when we have information not in their
17 possession.

18 THE COURT: Like publically available?

19 MR. GYANDOH: Exactly. It leads to confidential
20 agreements which we can't get publically available. Even our
21 clients in the normal course wouldn't be able to get the
22 service agreements. So we had to plead around that because we
23 don't have that information. So asking us to provide the
24 services is really not --

25 THE COURT: -- so can I ask you. I may have
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 misstated. So to the extent you understand or recognize the
2 cases in which counsel, Mr. Hines, is talking about, I'm
3 focusing on the Eastern District and I'm focusing on Judge
4 Clark and Judge Pitlyk, in terms of those cases, right? Were
5 they plead in the same way as it related to record-keeping
6 fees to your knowledge as this was?

7 MR. GYANDOH: Very similar.

8 THE COURT: Now, so the argument I would suspect had
9 to have been made to them -- say one was suggesting to me,
10 Judge Clark, these, the services or what we are pleading are
11 not available publically, therefore, I can not include them in
12 my petition.

13 MR. GYANDOH: We didn't have oral argument in those
14 cases. So I can't confirm that that argument was made. It
15 may have been done in the pleadings, but it was -- I don't
16 know if they actually took that into consideration.

17 THE COURT: Okay. But you're saying that the
18 pleadings may be the same, but we didn't have an opportunity
19 to argue that those particular services weren't public. We
20 have no way of putting them in.

21 MR. GYANDOH: That's right.

22 THE COURT: Okay.

23 MR. GYANDOH: So I think it all boils down to -- one
24 other thing, I know there was District Court decisions, I
25 can't do nothing about it, other cases, even cases within this
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 Circuit that went the other way.

2 THE COURT: Cases within this Circuit?

3 MR. GYANDOH: Yes.

4 THE COURT: With these same issues?

5 MR. GYANDOH: Yes.

6 THE COURT: The Eighth Circuit it seems like here is
7 pretty clear with respect to the standard, it seems to me. So
8 yes, persuasive from other circuits, other districts? Yes.
9 Just like the Courts in Eastern District of Missouri,
10 persuasive, I don't have to follow. Just like I don't even
11 have to follow if it was even in this Court. However, it's
12 within the Eighth Circuit interpreting case law from the
13 Eighth Circuit as opposed to outside the Circuit.

14 MR. GYANDOH: I believe we submitted the Hy-Vee
15 case. I don't have a copy of it, but in the Hy-Vee case the
16 judge said -- allowed the record-keeping claims to go forward
17 because a lot of the arguments were motion to be developed in
18 discovery. But what I was going to say was the most recent
19 decision was the decision in the Hughes versus Northwestern
20 which is from the Seventh Circuit. The Seventh Circuit was
21 interpreting -- it was a remand from the Supreme Court which
22 is sent back --

23 THE COURT: What did they say?

24 MR. GYANDOH: What they said was with allegations
25 similar to these -- the first thing they said was defendants'
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 reliance -- was Mr. Hines argument, is not as clear-cut as
2 they are making it to be because due to complications of
3 different cases and company stock so that does not in any way
4 heighten the pleading standard.

5 THE COURT: Do you agree there is a level of
6 heightened standard?

7 MR. GYANDOH: There is not.

8 THE COURT: On these type of cases in the Eighth
9 Circuit?

10 MR. GYANDOH: I do not think so. I do not think so
11 because the Matousek case was distinguishable as I said. And
12 all it says is you need a meaningful benchmark.

13 THE COURT: Which is what?

14 MR. GYANDOH: Well, the company provided the
15 context, not just the fact that there was other plans, but
16 also as the Northwestern case found, there was no request for
17 proposal which we --

18 THE COURT: Is there a requirement for that?

19 MR. GYANDOH: There is no requirement, but as the
20 Northwestern Court says, there is no requirement, but if you
21 didn't do it, it's just another factor.

22 THE COURT: But it's not required?

23 MR. GYANDOH: It's not required. It helps to reduce
24 the record-keeping costs.

25 THE COURT: And what case is that again?
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 MR. GYANDOH: Hughes versus Northwestern.

2 THE COURT: And where is that out of?

3 MR. GYANDOH: It's out of the Seventh Circuit.

4 THE COURT: What am I obligated to follow?

5 MR. GYANDOH: It's persuasive.

6 THE COURT: It's persuasive? Hold it. It's
7 persuasive, but you're sitting in the Eighth Circuit.

8 MR. GYANDOH: I know.

9 THE COURT: And if the Eighth Circuit is -- and
10 maybe this is too strong of a word, because I get on attorneys
11 when they use it so I'm a little hesitant. When it's clear
12 that that's not Eighth Circuit or it appears that that's
13 not -- that's what this Court has to follow, Eighth Circuit
14 precedent.

15 MR. GYANDOH: All right.

16 THE COURT: Not Seventh.

17 MR. GYANDOH: I understand that, but I think it's
18 within the Eighth Circuit precedent.

19 And first thing I think it is worth emphasizing
20 that, going back to the Brady versus Walmart case which is the
21 original Eighth Circuit case that said plaintiffs can't plead
22 a case to circumstantial evidence, and all claims should not
23 be dismissed because we don't have access to information. And
24 I'm paraphrasing, but that is what it said. And here I'm
25 saying that one of the key arguments from defendants is that
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 we didn't argue or allege that the services being obtained by
2 this Plan was -- were how it was different or the same to the
3 other plans. And what we are saying is that that information
4 one of the pieces of information that is not available to the
5 plaintiffs at the pleading stage. So in light of Eighth
6 Circuit precedent I think it allows us to plead a plausible
7 claim. At this point the whole goal here is that we are
8 trying to show the pleading stage that there is a prudent
9 process. That is what Your Honor is trying to find. Where we
10 put enough nuggets out there for you to think there is a
11 prudent process. We may not win at the end of the day, but
12 that is not the issue at this point.

13 THE COURT: But there's some limitation or at least
14 some -- it seems to me just reviewing the case, there seems to
15 be some limitation because of the cost and other things
16 associated with letting this move -- we want to make sure that
17 these benchmarks are comparative, because to move beyond that
18 state the cost that may be associated with the discovery and
19 other matters in this. Would you agree or disagree?

20 MR. GYANDOH: I would disagree to a point because
21 that advocates, advocates the discovery has the same issues.

22 THE COURT: Well, this seems to be more
23 particularized at least how I read it. There is a level of
24 and let me say in this case -- and then, counsel, I'll find it
25 here, one second.

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 You can go ahead.

2 MR. GYANDOH: Plaintiffs should not be hiding
3 pleading standard and there is none in this case simply to
4 avoid discovery. The rules allow notice pleading under
5 12(b) (6) as a leading standard. Here, I think, additionally,
6 if anything there is a real reason to stay in the 12(b) (6)
7 stage than other cases given the fact that we're about to
8 plead circumstantial evidence, where in other cases the Court
9 needs more particularize evidence.

10 THE COURT: They have to be meaningful.

11 MR. GYANDOH: Meaningful, yes. So at this stage the
12 plaintiffs have plead as much as a meaningful benchmark as
13 they can as they have access to. The other things we point to
14 in order to show that there is a prudent process was that some
15 had high expenses compared to medians. I know that defendants
16 have argued that that is not a meaningful benchmark.

17 THE COURT: In terms of what? Now say that again.

18 MR. GYANDOH: I'm sorry. In order to show that
19 perhaps there was -- the defendants were not prudently
20 managing the Plan, we purported to a handful of investment
21 options in the Plan which were more expensive than the median
22 and averages in those plans. We plead that in order to show
23 that where there is smoke, there is fire or there could be
24 fire.

25 THE COURT: Again, it seems to me that we're
 Denise Carroll Halasey CCR, CVR-CM, RVR
 United States Court Reporter

1 stopping when it should take a step further. Just again, this
2 term keeps coming up in my mind, it has to be apples to apples
3 or oranges to oranges, doesn't it?

4 MR. GYANDOH: It does. And I think what we have
5 done here is an apples to apples comparison.

6 THE COURT: Okay.

7 MR. GYANDOH: You know, in several courts -- granted
8 some courts within the Eighth Circuit have not -- have denied
9 motions -- granted motions to dismiss. But certainly all the
10 courts have not. And I submit the -- although, we believe --
11 I don't think Matousek undercuts what we are seeing here
12 because that was a different posture.

13 And the other thing about the total Plan costs is
14 that too is an indication that there was not a prudent process
15 in place because their Plan costs were so much higher than
16 other plans that there is an indications that these fiduciaries
17 were not prudently managing their Plan. I think we have to
18 look at this not just from one factor, but all the factors
19 which alleged as the totality of the circumstances, and I
20 think that pushes us over the plausibility line. And, you
21 know, certainly it allows us to move forward to try to prove
22 our claims. But I think to prevent plaintiffs from moving
23 forward at this stage based on what we have pled I think goes
24 against the standards that have been set for 12(b)(6). And as
25 the Supreme Court pretty well ruled --

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 THE COURT: Well, I need you to say as the Eighth
2 Circuit.

3 MR. GYANDOH: Yeah.

4 THE COURT: Listen. You saying everything ruled,
5 but you're saying everything but the Eighth Circuit. That is
6 what ultimately this Court follows.

7 For example, we have this one, investment by
8 investment, when they talk about it can't be simply bear
9 allegations, they have to be meaningful, management style of
10 this particular Plan. There is a level of particularity that
11 these cases that the Eighth Circuit is ruling on that shows
12 the strategy of these plans that is more of a comparison than
13 some general -- that is what I'm trying to get. That is what
14 it appears to me. And so these kind of vague comparisons to
15 me simply makes me question whether or not there is a
16 meaningful benchmark. But I'll let you finish, and then I'll
17 have a few questions for counsel.

18 MR. GYANDOH: I'll just finish by just focusing on
19 what the Eighth Circuit requires.

20 THE COURT: And I'm not saying the others is not
21 persuasive, but at the end of the day, you know, I'm looking
22 to the Eighth Circuit.

23 MR. GYANDOH: That's right, sir.

24 THE COURT: Go ahead.

25 MR. GYANDOH: What I was saying is that we need to
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 look at the Eighth Circuit case law through the lens of three
2 cases. The first case is the Brady versus Walmart case which
3 was many years ago, but it was one of the first cases that
4 dealt with these excessive fee cases. And that is the case
5 that said that you have -- some of the information is not in
6 the preview of plaintiffs so we have to allow them to plead
7 circumstantial evidence, and you can't dismiss them just
8 because they don't have information. So that is one case.

9 Then there is the Washington versus Davis case which
10 is the more recent Eighth Circuit case which also says there's
11 no set of meaningful benchmarks, it can be anything.

12 And the third case is Matousek which is the case I
13 started off with. But Matousek is not exactly on point here
14 because of the allegations in that case, but the meaningful
15 benchmark comment from there still pertains. And all -- it
16 talks about services, but here in order as I said plaintiffs
17 -- not just me, plaintiffs have a right, don't have access to
18 these service agreement, so what we thought in order to allege
19 that the services here were comparable is to say that --

20 THE COURT: You mean in terms of --

21 MR. GYANDOH: The record-keeping services.

22 THE COURT: The record-keeping?

23 MR. GYANDOH: Yes. And this is how we plead around
24 it. What we say is Fidelity and T.Rowe are both national
25 record keepers. They both are capable of providing the same
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 service and they both provide service to the same size plan.
2 So you can make the assumption if you will that the same size
3 plans require the same level of services. But yet, Fidelity
4 and other record-keepers we cite which are like T.Rowe charge
5 less for their record-keeping than T.Rowe. So we have apples
6 to apples by comparing T.Rowe price to other national record
7 keepers. We have apples to apples by looking at the number of
8 participants, which is the driver of the fees for the
9 services. And consistently we show that the O'Reilly Plan was
10 charging higher.

11 THE COURT: Okay.

12 MR. GYANDOH: Thank you, Your Honor.

13 THE COURT: Mr. Hines.

14 Mr. Hines, how am I ever going to plead if I can't
15 have publically available information that I'm not privy to
16 unless the discovery process moves forward?

17 MR. HINES: Well, there are two things about that,
18 Your Honor. If were talking about investment management fees
19 there are prospectuses available publically, there are
20 performance data publically, and plaintiffs can use that data
21 to plead a claim. And many courts have said that. If we move
22 to record-keeping I agree with Mr. Gyandoh that the Davis case
23 says there is no one way. And that's the point, Mr. Gyandoh
24 says I need a record-keeping fee contract. Well, he happened
25 to pick something, I agree, you can't get publically. But

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 there are other ways to plead a record-keeping claim. ERISA
2 requires extensive disclosures to participants. So
3 participants have a lot of information available to them
4 including plan documents, summary plan descriptions, and most
5 importantly account statements that participants get on a
6 quarterly basis that set fourth the fees that they pay on
7 record-keeping, that sets forth the fees and performance of
8 their investment options, and that's how the plaintiffs in the
9 Rosenkrantz case successfully pleaded a record-keeping claim
10 by using those participants statements and detailing exactly
11 what they pay for what. And plaintiffs presumably have their
12 record -- I'm sorry, their participants statements here, but
13 they chose not to use them. My brother brought up the
14 Northwestern case, and yes, it's in the Seventh Circuit, but
15 that's another example of how a plaintiff may plead a
16 record-keeping claim. And we submitted the complaint there at
17 Supplemental 4066-1 because it's important to look at what
18 they allege. There it was about a university plans, and they
19 alleged details about what four other plans did. They
20 reviewed, the plaintiffs in that case reviewed publically
21 available information, found what other plans did in the
22 university space and conducted --

23 THE COURT: How did they get all this public
24 information?

25 MR. HINES: They scoured websites.
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 THE COURT: Yeah.

2 MR. HINES: And they were able to plead what others
3 did.

4 THE COURT: So you're saying in this case that they
5 chose to plead this particular way?

6 MR. HINES: That is exactly what I'm saying.

7 THE COURT: That there are other options that other
8 successful claims in terms at this stage, the 12(b)(6) stage,
9 that they just pled it differently, but they were able to get
10 that type of comparable.

11 MR. HINES: Correct. They chose to plead with a
12 chart and fees. And that is one way that they can try to do
13 it, but I submit to Your Honor that that is not meaningful in
14 any way, shape, or form.

15 If I might the last thing I want to address is this
16 concept that I've heard it a couple times, heightened pleading
17 or particularity. I personally would stay away from that, and
18 I would just say that that is what the Eighth Circuit, the
19 meaningful benchmark standard is how the Eighth Circuit has
20 applied an eight ball to these particular cases.

21 THE COURT: As opposed to some heightened. And that
22 is what the Court has been using. But, yes, I agree with you.

23 MR. HINES: That's exactly right.

24 THE COURT: That's just how they applied at this
25 stage. Thank you.

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 Counsel, I'll give you about two minutes and then we
2 will windup. What about that? That's a good point and then
3 we will done. That, you know, they pled it the way they pled
4 it, and it's not meaningful. That's not a meaningful
5 benchmark. There are opportunities to get the very
6 information you have. And if you would have utilized these
7 ways, if it's there, then you could get there.

8 MR. GYANDOH: Yes. I would say this to that.

9 So we have an occasion to discovery, our personal
10 pain is that --

11 THE COURT: I don't want to know your personal pain.
12 I want to know what the law says.

13 MR. GYANDOH: What the law says.

14 So if necessary I think we could amend the complaint
15 to state a claim because we could --

16 THE COURT: But counsel argues, it's too late,
17 Judge. They have been here. This case is fully briefed, they
18 amended it once, and now they have had all this time and they
19 want to amend it again.

20 MR. GYANDOH: Well, there was law submitted up until
21 the Court says no more.

22 THE COURT: I understand that. I guess, counsel is
23 saying, no more, Judge. They have had two bites at the apple.

24 MR. GYANDOH: I identified how I think our case has
25 meet the pleading standard. Your Honor has talked about all
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 the ways that could meet it. Some of the ways were account
2 statements which we got through discovery. Some of which are
3 record-keeping agreements which we got through discovery.
4 Which are what we used to submit the complaint. I would
5 submit that if Your Honor's inclined to dismiss the case, I do
6 think we are allowed one more opportunity to amend the
7 complaint to using what we've got in discovery to amend the
8 complaint.

9 THE COURT: Okay. Thank you.

10 Let me take a brief recess and then the Court will
11 be out to make a ruling on the record.

12 (THEREUPON, a short recess was had; WHEREUPON, the following
13 proceedings were had.)

14 THE COURT: You all can be seated.

15 Well, let me first start by thanking counsel for
16 coming in. It always helps the Court in terms of bringing
17 clarity to questions of law or fact that may not be as clear
18 to the Court just from the written briefs. That's why I tend
19 to call folks in. It helps put a fine point on argument. And
20 I think today is no different with respect to these particular
21 issues in this case.

22 The Court having heard argument and the Court finds
23 consistent with the record will grant defendants' motion
24 12(b)(6) motion. The Court finds the plaintiff through
25 pleadings have failed to provide a solid basis for comparison,
Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 a meaningful benchmark, as it relates to record-keeping,
2 investment funds, and total Plan costs. I think consistent
3 with the case law that both parties have articulated to the
4 Court, that have failed to show a meaningful benchmark.

5 What remains is the question with regard to whether
6 or not the Court will allow plaintiff the opportunity to amend
7 the pleadings. And that will be also denied by this Court.
8 This matter has, you know, I think the case law supports and I
9 went back and had to double check with particularity how these
10 matters and I think the Eighth Circuit said how these matters
11 specifically could be pled, and which would clear the hurdle
12 of 12 (b) (6) dismissal. And I think the plaintiff in this
13 case, as the Court has articulated has failed to plead that
14 meaningful benchmark. And so any motion, oral motion for
15 leave to amend will be denied.

16 Anything further for the record?

17 MR. HINES: Nothing from defendant, Your Honor.
18 Thank you.

19 THE COURT: Anything from the plaintiff?

20 MR. GYANDOH: No, Your Honor.

21 THE COURT: Thank you all. I appreciate it.

22 What I forgot, and thank you, Ashanti.

23 You know, initially, my initial question to both
24 parties was if Count 1 fails where does that led us with
25 regard to Count 2. And I think by plaintiff own -- and I

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter

1 think the parties agree that if Count 1 fails, Count 2 fails?
2 Is that correct?

3 MR. GYANDOH: Yes, Judge.

4 THE COURT: Okay. I just wanted to make that clear
5 for the record. Thank you.

6
7 (THEREUPON, the following proceedings were adjourned.)
8

9 CERTIFICATE
10

11 I certify that the foregoing is a correct transcript
12 from the record of the proceedings in the above-entitled
13 matter.

14 June 13, 2023
15

16 /s/ Denise C. Halasey
17 Denise C. Halasey, CCR, CVR-CM, RVR
18 United States Court Reporter
19
20
21
22
23
24
25

Denise Carroll Halasey CCR, CVR-CM, RVR
United States Court Reporter